Nos. 01-1459

IN THE
Supreme Court of the United States

KENNETH J. ELWOOD, District Director,
Immigration and Naturalization Service,
Petitioner,

v.

SABRIJA RADONCIC,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, GEORGE GEKAS, WALTER JONES, LAMAR SMITH, JOHN SWEENEY, AND DAVE WELDON; U.S. SENATOR JESSE HELMS; AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: May 31, 2002

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF); U.S. Representatives Bob Barr, Joe Barton, George Gekas, Walter Jones, Lamar Smith, John Sweeney, and Dave Weldon; U.S. Senator Jesse Helms; and the Allied Educational Foundation respectfully

move for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief. Counsel for Respondent -- although indicating that he would consent to the filing of *amicus curiae* briefs on the merits if the Court should grant the petition -- declined to consent. Accordingly, this motion is necessary.

WLF is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Honorable Jesse Helms is a United States Senator from North Carolina. The Honorable Bob Barr, the Honorable Joe Barton, the Honorable George Gekas, the Honorable Walter Jones, the Honorable Lamar Smith, the Honorable John E. Sweeney, and the Honorable Dave Weldon are United States Representatives from, respectively, Georgia, Texas, Pennsylvania, North Carolina, Texas, New York, and Florida. Rep. Gekas is Chairman of the Immigration and Claims Subcommittee of the House Judiciary Committee; Rep. Smith is the former Chairman of the Subcommittee. All believe strongly that Congress and the Executive Branch ought to be permitted to protect American citizens by imposing finite periods of detention on those

removable aliens who have been adjudged guilty of aggravated felonies. All are supporters of the mandatory detention provisions of 8 U.S.C. § 1226(c) and believe that it is fully consistent with the requirements of the U.S. Constitution.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, proposed *amici* believe that the political branches of government must be afforded broad power to detain aliens who are convicted of aggravated felonies. Where those aliens admit they are here illegally but nonetheless are fighting deportation based on efforts to win discretionary adjustment of status, proposed *amici* believe that the Immigration and Naturalization Service ("INS") ought to detain such aliens during the time it takes to complete deportation proceedings.

Amici are concerned that the decision below, if allowed to stand, will result in an unwarranted abridgement of the power of the political branches of government to control immigration into this county, a power that historically has been subject to only extremely limited judicial review. The decisions below discuss at great length the alleged rights of illegal aliens who are convicted felons, but do not seem to have taken into account the rights of the federal government to enforce its immigration laws or the rights of those who

may be threatened by Mr. Radoncic's continued presence in American society.

For the foregoing reasons, the Washington Legal Foundation; U.S. Representatives Bob Barr, Joe Barton, George Gekas, Lamar Smith, and John Sweeney; U.S. Senator Jesse Helms; and the Allied Educational Foundation respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

Whether Respondent's mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment, where Respondent entered the United States illegally and was convicted of an aggravated felony while unlawfully present in the United States?

The case also raises the following antecedent question:

Whether a federal district court possesses jurisdiction under 28 U.S.C. § 2241 to set aside the action of the Attorney General in detaining a removable alien who entered the United States illegally and was convicted of an aggravated felony while unlawfully present in the United States, despite 8 U.S.C. § 1226(e)'s admonition that "[n]o court may set aside any action or decision by the Attorney General" to detain an alien under § 1226?

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INTERESTS OF AMICI CURIAE

The interests of *amici curiae* Washington Legal Foundation, *et al.*, are set forth in the motion accompanying this brief.[1]

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the Petition for a Writ of Certiorari. In brief, Sabrija Radoncic is a 42-year-old citizen of Serbia-Montenegro who entered the United States illegally in March 1991 (prior to the onset of open warfare in the former Yugoslavia) by sneaking across the border from Mexico near San Diego; he has remained in this country ever since. The record does not state how Mr. Radoncic has supported himself since coming to this country, other than to indicate that he has engaged repeatedly in alien smuggling.

An Immigration Judge (IJ) found that Mr. Radoncic has been arrested on three occasions for alien smuggling: in 1993 in Detroit; in July 1996 in Champlain, New York; and

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

in August 1996 in Vermont. Pet. App. 37a-38a. At least one alien paid Mr. Radoncic $5,000 to smuggle him into the country. *Id.* at 40a, 60a, 62a. The IJ found that Mr. Radoncic was part of a "criminal enterprise": "a large scale smuggling network." *Id.* He characterized Mr. Radoncic's behavior as that of a "seasoned," "experienced," and "hardened" criminal. *Id.* at 61a, 62a.

The August 1996 arrest led to a January 1999 conviction in U.S. District Court for the District of Vermont for smuggling aliens into the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(i), and for conspiring to smuggle aliens into the United States, in violation of 18 U.S.C. § 371. *Id.* at 2a-3a. Mr. Radoncic was sentenced to 18 months in prison, a sentence he began serving in February 1999. *Id.*

In November 1993, Mr. Radoncic and his wife, who are Muslims, applied for asylum on the basis of religious persecution. In March 1996, the Immigration and Naturalization Service (INS) initiated deportation proceedings, charging that Mr. Radoncic and his wife had entered the country without inspection and were not entitled to remain. At a subsequent hearing in July 1996, they conceded deportability but requested asylum, withholding of removal, and voluntary departure in the alternative. *Id.* at 2a. Mr. Radoncic also sought withholding or deferral of removal pursuant to Article 3 of the Convention Against Torture. *Id.*

Following a hearing, the IJ issued a decision on April 11, 2000, denying Mr. Radoncic's application for relief and ordering his removal to Serbia-Montenegro. *Id.* at 22a-71a. The IJ found that Mr. Radoncic had failed to meet his burden of demonstrating that he would be subject to persecution if returned to Serbia-Montenegro. *Id.* at 55a-57a. The IJ

determined that Mr. Radoncic's testimony regarding persecution was not "credible," a persecution claim based largely on "fraudulent" documents presented by Mr. Radoncic that purported to show that he had faced criminal charges in Serbia because of his opposition to the government. *Id.* at 54a-57a. The IJ further determined that because Mr. Radoncic had been convicted of "a particularly serious crime" within the meaning of 8 U.S.C. § 1231(b)(3)(B)(ii), Mr. Radoncic was ineligible for withholding of removal (under either 8 U.S.C. § 1231(b)(3) or Article 3 of the Convention Against Torture). *Id.* at 57a-63a. The IJ explicitly found that if allowed to remain in the country, Mr. Radoncic was "at serious risk to resume his illegal activities in the future," activity that "by its nature poses a risk to the security of the United States." *Id.* at 62a.

Mr. Radoncic appealed that decision to the Board of Immigration Appeals (BIA). By order dated November 13, 2001, the BIA affirmed the IJ's finding that Mr. Radoncic was ineligible for asylum and withholding of removal because he had been convicted of a particularly serious crime. *Id.* at 19a. The BIA also held that he had failed to demonstrate eligibility for *deferral* of removal under the Convention Against Torture because he had failed to produce credible evidence that he would face torture if returned to Serbia-Montenegro. *Id.* at 19a-20a. Accordingly, the BIA dismissed Mr. Radoncic's appeal. *Id.* at 21a. Mr. Radoncic has sought review of that decision in the U.S. Court of Appeals for the Second Circuit and has also asked the BIA to reconsider its decision. Pet. 10.

Mr. Radoncic completed his criminal sentence on May 19, 2000 and was taken into custody by the INS. The INS viewed Mr. Radoncic's detention as mandatory under 8

U.S.C. § 1226(c) because his Vermont convictions constituted "aggravated felony" convictions within the meaning of 8 U.S.C. § 1101(a)(43)(N) and (U), and thus rendered him deportable under 8 U.S.C. § 1227(a)(2)(A)(iii).

After an IJ denied his request for a bail hearing (on the ground that detention was mandatory under § 1226(c)), Mr. Radoncic filed a habeas corpus petition in U.S. District Court for the Eastern District of Pennsylvania. On November 8, 2000, the district court granted the petition. Pet. App. 7a-17a. The court ordered Mr. Radoncic released from detention unless the INS "commences an individual evaluation, including an individual hearing and decision within thirty days, to determine whether the continued detention of Petitioner is necessary to prevent risk of flight or danger to the community." *Id.* at 16a. The court held that § 1226(c)'s mandatory detention provision violated the Fifth Amendment's Due Process Clause, even as applied to aliens (such as Mr. Radoncic) who had entered the country illegally, because: (1) such aliens may not be detained in the absence of evidence that they pose a risk of flight or a threat to the community; and (2) they are entitled to an "individualized evaluation" to determine whether they pose a risk of flight or a threat to the community. *Id.* at 10a-16a. Later that month, Mr. Radoncic posted a $5,000 bond and was released from custody. *Id.* at 5a.

On January 4, 2002, the U.S. Court of Appeals for the Third Circuit affirmed. *Id.* at 1a-6a. The appeals court noted that, in a case decided the previous month, it had invoked the Due Process Clause to strike down 8 U.S.C. § 1226(c) to the extent that it permitted the detention of removable aliens who are still pursuing administrative appeals, in the absence of an individualized finding that the

aliens pose a risk of flight or a danger to the community. *Id.* at 5a (citing *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001)). Although acknowledging that the facts in this case differed "to some extent" from those in *Patel* (*e.g.*, Mr. Radoncic has never had any right to live in this country, while the alien in *Patel* had been a permanent resident alien prior to being convicted of an aggravated felony), the appeals court concluded that "the legal issue is the same" and accordingly affirmed the district court's holding on the basis of its *Patel* decision. *Id.* at 5a-6a. Neither the district court nor the appeals court considered whether it possessed jurisdiction to hear Mr. Radoncic's habeas petition.

REASONS FOR GRANTING THE PETITION

Amici fully support the arguments put forth by Petitioner (hereinafter, the "INS"). The Third Circuit has held an Act of Congress unconstitutional; that alone warrants review of the court of appeals decision. Moreover, the appeals court's decision directly conflicts with a decision of the U.S. Court of Appeals for the Seventh Circuit.

Amici write separately in order to emphasize several points. First, the appeals court's decision is directly contrary to numerous decisions of this Court. The Third Circuit failed to accord the deference demanded by this Court to decisions of Congress and the Executive Branch with respect to immigration matters. That failure is particularly troubling in light of overwhelming evidence that: (1) aliens released from detention pending deportation after having been convicted of aggravated felonies pose a serious public safety risk; (2) the INS has no effective means of assuring the removal of alien felons following the completion of administrative proceedings unless it can detain them while those proceedings are

ongoing; and (3) in a very real sense, alien felons being detained pending removal hold the keys to their jail cells because they can win their freedom at any time so long as they agree to leave the country while their administrative appeals are pending.

Second, the Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), in no way reduces the need to resolve the conflict between the decision below and the Seventh Circuit's decision in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999). *Parra* is fully consistent with this Court's *Zadvydas* decision, and the Seventh Circuit has given no indication since *Zadvydas* was decided in June 2001 that it is considering abandoning its *Parra* decision.

Third, Congress has unambiguously decreed that the federal courts are not to "set aside any action or decision" of the INS taken pursuant to 8 U.S.C. § 1226 "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e). It is undisputed that the INS acted pursuant to 8 U.S.C. § 1226 in determining that Mr. Radoncic should be detained pending removal. Accordingly, the Court should grant review in this case to determine whether the lower courts possessed jurisdiction to overturn the INS's decision to detain Mr. Radoncic; § 1226(e) clearly suggests that they did not.

I. DEPORTABLE ALIENS CONVICTED OF AGGRAVATED FELONIES HAVE NO DUE PROCESS RIGHT TO REMAIN AT LIBERTY WITHIN AMERICAN SOCIETY WHILE THEY CONTEST THEIR REMOVAL

In denying Mr. Radoncic's petition for relief from deportation, the IJ characterized Mr. Radoncic's behavior as that of a "seasoned," "experienced," and "hardened" criminal. Pet. App. 61a, 62a. The IJ ordered that Mr. Radoncic be removed, and the BIA affirmed. Although he has appealed that decision, Congress has decreed that those in Mr. Radoncic's position "shall" be detained by the INS pending removal. The Third Circuit nonetheless ruled that Mr. Radoncic has a substantive due process right to be free from detention while he contests the removal order, in the absence of an "individualized" finding that he poses either a risk of flight or a threat to the community.

In so holding, the Third Circuit did not merely dismiss considered views to the contrary from both Congress and the Seventh Circuit. Its decision is also in conflict with numerous decisions of this Court that have emphasized the need for the federal courts to defer to the views of the elected branches of government in immigration-related matters. The Court should grant review to resolve that conflict.

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due pro-

cess," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno,* 481 U.S. 739, 746 (1987) (quoting *Rochin v. California,* 342 U.S. 165, 172 (1952), and *Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a federal law that mandates detention of removable aliens who have been convicted of aggravated felonies and who wish to remain in the United States while they contest their removal, particularly where detention is limited to the relatively brief period necessary for all removal proceedings to be completed.[2]

Government detention of individuals -- even those present in this country illegally -- unquestionably implicates the Due Process Clause's prohibition against unwarranted deprivations of "liberty." As the Court has made clear, "Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause protects." *Zadvydas*, 121 S. Ct. 2491, 2498 (2001). But the federal government will often have legitimate reasons to impinge on personal liberty, and any claim that abridgement of personal freedom "shocks the conscience" must be judged in light of the government's justifications for its actions:

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[2] Although the Third Circuit was not altogether clear on this point, *amici* do not understand the appeals court to have held that the INS violated Mr. Radoncic's rights to *procedural* due process. The appeals court indicated that the Constitution prohibited Mr. Radoncic's detention in the absence of individualized findings that he presented a flight risk or a threat to safety, *without regard to how much process the INS afforded him* before taking him into custody. Pet. App. 5a-6a.

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

Youngberg v. Romeo, 457 U.S. 307, 320 (1982).

When that balancing process is undertaken within the context of immigration matters, the balance tilts decidedly in favor of upholding federal restraints on the liberty of noncitizens imposed by Congress and the Executive Branch in the name of national security and safety. In fact, the law is quite clear that when it comes to matters of immigration policy, the judicial branch has a very limited role to play. "The power to regulate immigration -- an attribute of sovereignty essential to the preservation of any nation -- has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 864 (1982). As a result, the Court has "underscore[d] the limited scope of judicial inquiry" into immigration-related matters. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977). "The power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21 (1976). *Accord, Miller v. Albright,* 523 U.S. 420, 455 (1998) (Scalia, J., concurring) ("Judicial power over immigration and naturalization is extremely limited.").

As the Court has explained:

> "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952)).

In conflict with this Court's case law, the Third Circuit declined to defer to Congress's judgment that sound immigration policy requires the detention of deportable aliens who have been convicted of aggravated felonies. *Patel*, 275 F.3d 299, 308, 314 (3d Cir. 2001).[3] In support of its refusal to defer to Congress, the Third Circuit argued:

> The Supreme Court recently addressed this issue [of deference] in *Zadvydas* and distinguished between the deference that must be afforded to immigration policies and the more searching review of the procedures used to implement those policies. 121 S. Ct. at 2501-502. The issue in the present case implicates the latter, the means by which Congress effects its determinations regarding who should be deported and on what basis,

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[3] *Patel* was argued on the same day as this case, in front of the same three-judge panel. The panel issued a lengthy opinion in *Patel* in December 2001. When the panel issued its decision in this case two weeks later, it provided an extremely truncated version of its due process findings and instead relied on *Patel*, asserting, "[T]he legal issue [in the two cases] is the same." Pet. App. 5a. Accordingly, in setting forth the Third Circuit's rationale in this case, *amici* cite extensively to the *Patel* decision.

> not the actual criteria for deportation. . . [A]s noted above, the Supreme Court in *Zadvydas* made clear that Congress' authority over the means of implementing its policies is limited by the Constitution and need not be accorded deference. 121 S. Ct. at 2501.

Id. at 308, 314.

The Third Circuit's rationale for refusing to defer to Congress is a clear misreading of *Zadvydas*. Nowhere did *Zadvydas* attempt to distinguish between immigration *policies* and immigration *procedures* and to limit deference to issues addressing the former. Rather, the Court stated:

> The Government also looks for support to cases holding that Congress has "plenary power" to create immigration law, and that the judicial branch must defer to executive and legislative branch decisionmaking in this area. . . But that power is subject to important limitations. See *INS v. Chadha*, 462 U.S. 919, 941-942 (1983) (Congress must choose "a constitutionally permissible means of implementing" that power). . . In these cases, we focus upon those limitations. . . The question before us is not one of "'confer[ring] on those admitted the right to remain against the national will'" or "'sufferance of aliens'" who should be removed. *Post,* at 2505-2506 (SCALIA, J., dissenting) (quoting [*Shaughnessy v. United States ex rel.*] *Mezei*, 345 U.S. [206,] 222-223 [(1953)] (Jackson, J., dissenting)). Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

Zadvydas, 121 S. Ct. 2502-03. In other words, contrary to the Third Circuit's belief, *Zadvydas* did not create a category of immigration law (*i.e.*, laws that establish "procedures" for carrying out immigration policy) for which judicial deference is unwarranted. Rather, the Court made clear that *all* immigration law is entitled to substantial deference, but that the Court in extraordinary cases will step in -- as where detention of an alien whom the government is unable to remove effectively results in a life sentence.

In adopting § 1226(c), Congress determined that release of alien felons pending removal would entail such an extraordinarily high risk of flight and of danger to the community that detention of all such aliens (pending completion of removal proceedings) was mandated. In conflict with numerous decisions of this Court, the appeals court refused to defer to Congress's assessment of the risks involved. Congress had good reason to fear that release of alien felons pending removal posed a significant risk to public safety. For example, a General Accounting Office report cited during floor debates by a House sponsor of 1996 immigration reform legislation found that "77 percent of noncitizens convicted of felonies are arrested at least one more time" before being deported. 142 Cong. Rec. 7972 (1995). A major study of criminal aliens conducted by Los Angeles County reached a similar conclusion. Los Angeles County Wide Criminal Justice Coordination Committee, "Impact of Repeat Arrests of Deportable Aliens in Los Angeles County" [hereinafter, "Impact"], July 15, 1992. The study traced the activity of 1,875 inmates released from Los Angeles County jail in May 1990 who had been identified by the INS as "deportable aliens." Of those 1,875, 772 had been rearrested *within one year*, and those 772 had been arrested a total of 1,522 times. Impact at iv.

The INS introduced substantial evidence in this case that alien felons released on bond pending removal also pose a significant risk of flight. For example, the INS cited a study indicating that 90% of criminal aliens not detained during removal proceedings end up fleeing. *Patel,* 275 F.3d at 312.[4] The Third Circuit nonetheless refused to defer to Congress's judgment that this evidence justified detention of all alien felons, asserting that substantive due process prohibited the INS from detaining any alien felon unless it could demonstrate that *that* alien would flee: "[E]ven if the ninety percent figure were correct, [§ 1226(c)] requires the imprisonment of the ten percent of aliens who would dutifully report to proceedings." *Id.*

In refusing to defer to Congress's considered judgment on this issue, the Third Circuit appeared to assume that an individual felon's propensity to flee or to commit additional crimes could be determined as a factual matter. That assumption is without foundation; there is never any means by which government officials can predict future behavior of any given individual with 100% accuracy. All Congress can be expected to do is to use available information to predict how a class of individuals is likely to behave if released from detention. It has determined that *any* alien in Mr. Radoncic's position is much more likely than not, if released from detention while removal proceedings continue, either to flee or to commit additional crimes. The Third Circuit's refusal to accept that determination is in conflict with the numerous decisions of this Court that have counseled judicial deference to the political branches of government on immigration mat-

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[4] The Seventh Circuit relied in part on this study in rejecting a due process challenge to § 1226(c)'s mandatory detention provision. *Parra*, 275 F.3d at 956 (citing 62 Fed. Reg. 10,312, 10,323 (1997)).

ters. *See, e.g., INS v. St. Cyr,* 121 S. Ct. 2271, 2287 n.38 (2001) ("the scope of review on habeas [in immigration cases] is considerably more limited than on APA-style review").

In contrast to the government's strong interest in detaining him, Mr. Radoncic has at most a minimal "liberty" interest in being allowed to roam freely in American society. Indeed, Mr. Radoncic's detention was not solely or even primarily the INS's doing. In a very real sense, Mr. Radoncic at all times held the keys to his cell. He was free to leave detention provided only that he agree to leave the country. A choice between detention or leaving the country could be viewed as a Hobson's Choice for citizens and permanent resident aliens who have reasonable expectations of being permitted to remain in the United States. But self-confessed illegal aliens, such as Mr. Radoncic, who have *never* had any legitimate expectation of being permitted to remain on a permanent basis have, at most, only minimal "liberty" interests in living freely in this country. This Court has never suggested that aliens who are here illegally are entitled to the same level of constitutional protection as citizens or permanent resident aliens. *See, e.g., Reno v. Flores,* 507 U.S. 292, 306 (1993) ("Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings.") Accordingly, when such removable aliens choose incarceration as the price for remaining in this country, their claims that incarceration is depriving them of Fifth Amendment "liberty" ring hollow.

In sum, review is warranted of the Third Circuit's determination that Mr. Radoncic's "liberty" interest in being released into American society outweighs the government's interest in detaining, pending removal, *all* illegal aliens who

have been convicted of aggravated felonies, as a means of preventing flight and protecting public safety.

II. *ZADVYDAS* IN NO WAY LESSENS THE NEED FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS

The Third Circuit acknowledged that its decision striking down § 1226(c) was in conflict with the Seventh Circuit's *Parra* decision. *Patel,* 275 F.3d at 313. The Third Circuit suggested, however, that any conflict was unlikely to persist because *Parra* had been superseded by *Zadvydas*:

> However, *Parra* was decided before *Zadvydas* and thus the Seventh Circuit did not have the benefit of the Supreme Court's analysis of the constitutional concerns presented by mandatory detention of aliens.

Id.

The Third Circuit's suggestion is misguided; there is no inconsistency between *Parra* and *Zadvydas*. This Court made clear in *Zadvydas* that the detention of those who once were classified as permanent resident aliens -- even permanent resident aliens who have been convicted of aggravated felonies -- implicates the Due Process Clause. But the Seventh Circuit in *Parra* did not hold otherwise; it merely held that the minimal "liberty" interests of the alien felon being detained in that case were insufficient to overcome the INS's strong interests in detaining him. *Parra*, 172 F.3d at 958. That holding is in direct conflict with the Third Circuit's holding in this case: the Third Circuit found that the due process balance tilted in favor of the alien felon, even though Mr. Radoncic (as an illegal alien who never had

had any right to live in this country) had an even weaker "liberty" interest than Mr. Parra, who prior to his conviction had been a permanent resident alien.

Zadvydas involved an entirely different balancing process. That case involved permanent resident aliens from Lithuania and Cambodia who, although subject to final removal orders, could not be sent anywhere in the foreseeable future because no country was willing to accept them. The Court concluded:

> [T]he issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States. . . An alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, . . . the Constitution permits detention that is indefinite and potentially permanent.

Zadvydas, 121 S. Ct. at 2502.[5]

In sharp contrast, this case and *Parra* both involved alien felons whose removal proceedings were ongoing. Unlike in *Zadvydas*, neither Mr. Radoncic nor Mr. Parra faced "indefinite and potentially permanent" detention (because removal proceedings would be completed within a relatively short period of time). Moreover, because there is

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[5] The Court did not answer that "serious question." Rather, it invoked the doctrine of constitutional doubt to interpret 8 U.S.C. § 1231(a)(6) as prohibiting detention of such aliens for more than six months after completion of the deportation process, if "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 121 S. Ct. at 2505.

no evidence that Serbia-Montenegro is unwilling to accept Mr. Radoncic or that Mexico was unwilling to accept Mr. Parra, both were free to end their detention at any time by leaving the country. Accordingly, nothing in this Court's *Zadvydas* decision is likely to cause the Seventh Circuit to reassess its conclusion that § 1226(c) passes constitutional muster,[6] and the conflict between the Third and Seventh Circuits is likely to persist until resolved by this Court.

III. THE COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER LOWER FEDERAL COURTS HAVE JURISDICTION TO OVERTURN § 1226(c) DETENTION DECISIONS

The Court should also grant review to consider an issue not raised in the petition: whether lower federal courts have jurisdiction to overturn § 1226(c) detention decisions. It is always appropriate, of course, for a court *sua sponte* to raise the issue of its own jurisdiction, and the jurisdictional issue is a "subsidiary question fairly included" within the question presented by Petitioner. SUP. CT. R. 14.1(a).

The district court and Third Circuit asserted jurisdiction over this case under the federal habeas corpus statute, 28 U.S.C. § 2241. However, 8 U.S.C. § 1226(e) clearly suggests that no such jurisdiction exists in the lower federal courts:

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[6] The Seventh Circuit has been called upon to apply *Zadvydas* in several recent cases. Although none of those cases addressed § 1226(c), none of the opinions contains language suggesting that *Parra*'s continued vitality is subject to question. *See, e.g., Hoyte-Mesa v. Ashcroft*, 272 F.3d 989 (7th Cir. 2001).

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside *any action or decision* by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole. (Emphasis added.)

There is no question that following Mr. Radoncic's release from federal prison in May 2000, the INS detained him "under this section," *i.e.*, under 8 U.S.C. § 1226. Accordingly, the only plausible reading of § 1226(e) is that Congress intended to prohibit federal courts from "set[ting] aside" the INS's decision to detain Mr. Radoncic and other similarly situated criminal aliens.

Although each of the appeals courts to consider the issue has held that § 1226(e) is *not* a bar to habeas corpus claims such as Mr. Radoncic's, those courts have arrived at their decisions by simply ignoring the plain statutory language. The Seventh Circuit evaded the jurisdictional bar in *Parra* by claiming that § 1226(e) prohibits only "[t]wo particular avenues of attack" on detention decisions: (1) an argument that the Attorney General erred in applying § 1226 to an alien; and (2) an argument that he erred in deeming the alien statutorily ineligible for bail. *Parra*, 172 F.3d at 957. The court held that "[a] person who has different legal arguments may present them," including an argument that detention is improper because § 1226(c) is unconstitutional. *Id.* That interpretation of § 1226(e) is not plausible. The second sentence of § 1226(e) does not state that certain types of detention decisions or certain types of legal challenges to detention are barred; rather, it states categorically that "[n]o

court may set aside" an INS decision to detain an alien felon pursuant to § 1226.[7]

The Third Circuit in *Patel* likewise held that § 1226(e) does not bar judicial review of a habeas corpus challenge to INS detention of an alien felon under § 1226. But it did so without any real analysis; it simply cited to *Parra* and stated in conclusory fashion: "[§ 1226(e)], which restricts judicial review of INS decisions made under this section [1226], does not restrict judicial review of its constitutionality." *Patel,* 275 F.3d at 302.

Amici recognize that there is "a strong presumption in favor of judicial review of administrative action," and that the Court has a "rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr,* 121 S. Ct. 2271 (2001). Nonetheless, there is no plausible interpretation of § 1226(e) other than that Congress intended

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[7] The Seventh Circuit attempted to draw support from this Court's interpretation of another jurisdiction-limiting statute in *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999). The comparison was not well-taken. The statute at issue in *American-Arab,* 8 U.S.C. § 1252(g), sharply limits judicial review of claims by an alien "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against an alien under this Act." The Court concluded that § 1252(g) imposed limits on judicial review *only* when the plaintiffs' claims addressed one of the three types of "decision[s] or action[s]" enumerated in § 1252(g); but the Court made clear that § 1252(g) applied *regardless* of the grounds raised by the alien to challenge the Attorney General's decisions or actions in these three areas. *American-Arab*, 525 U.S. at 482-83. Similarly, 8 U.S.C. § 1226(e) prohibits a court from "set[ting] aside" a decision by the Attorney General to detain an alien felon pursuant to § 1226, *regardless* of the basis for challenging detention.

to preclude *all* lower-court review of an INS decision to detain an alien felon pursuant to § 1226.[8] The Court should grant the petition to consider whether the Third Circuit erred in asserting jurisdiction over Mr. Radoncic's claim.

The only plausible basis for upholding the Third Circuit's assertion of jurisdiction is a finding that § 1226(e) is void as a violation of the Suspension Clause of the Constitution. In light of *St. Cyr*, any effort to deny judicial review of INS detention decisions raises a "serious question" under the Suspension Clause. Nonetheless, *amici* note that the Court has never invoked the Suspension Clause to strike down a federal statute. Moreover, given the strong presumption of constitutionality of federal legislation, the Court should not permit federal courts to assert jurisdiction over a claim in violation of a federal statute without first granting review to determine whether the statute is constitutional.

CONCLUSION

Amici curiae respectfully request that the Court grant the Petition.

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[8] Section 1226(e) could plausibly be read as not barring claims that the detainee is not actually an alien or has not actually been convicted of an aggravated felony. Detention in such circumstances arguably is not detention "under this section," thereby rendering the statutory bar inapplicable. However, Mr. Radoncic does not contest that he is an alien who entered this country illegally, nor does he contest that the crimes of which he stands convicted are "aggravated felonies" within the meaning of 8 U.S.C. § 1101(a)(43)(N) and (U).

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